BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

INLAND FOUNDRY COMPANY, INC., **Appellant,** **v.** **SPOKANE COUNTY AIR POLLUTION CONTROL AUTHORITY,** **Respondent.**	**PCHB NOS. 94-150 & 94-154** **ORDER DENYING MOTION TO DISMISS CONSTITUTIONAL CLAIMS**

Respondent, Spokane County Air Pollution Control Authority ("SCAPCA"), on November 2, 1994, filed with the Pollution Control Hearings Board ("Board") separate motions to dismiss to Inland Foundry Company, Inc.'s ("Inland") constitutional challenges to SCAPCA's Orders 94-04 & 94-05. Order 94-04 compelled Inland to submit an emissions inventory by July 30, 1994; Order 94-05 required Inland to comply with the best available control technology ("BACT").

Inland filed responsive memoranda on November 14. SCAPCA filed replies on November 21.

The Board was comprised of: Robert V. Jensen, Chairman and James A. Tupper, Jr. Richard C. Kelley, Presiding Officer, was absent on jury duty.

Inland is represented by attorney Eric K. Nayes; SCAPCA is represented by attorney Thomas F. Kingen, of Perkins Coie.

The Board considered the following pleadings:

1) Motions of the Spokane County Air Pollution Control Authority for Dismissal of Constitutional Claims;

2) Memoranda of Appellant, Inland Foundry Company, Inc., in Response to Motion of Respondent, SCAPCA, to Dismiss Constitutional Claims; and

3) Memoranda of the Spokane County Air Pollution Control Authority in Reply to Inland's Response to SCAPCA's Motion to Dismiss Constitutional Claims.

Having considered the legal arguments, we rule as follows:

I

Inland raises the following constitutional challenges in its appeal of Order 94-04, compelling Inland to submit a emissions inventory by July 30, 1994:

1) Appellant, Inland Foundry Company, Inc., is not in violation of SCAPCA Regulation 1, Article IV, Section 4.01 because said regulation does not specify what, if any, registration information is to be updated annually. Accordingly, said regulation, as applied, is in excess of the power granted to the Board of the Spokane County Air Pollution Control Authority, is unconstitutionally vague, and denies Appellant, Inland Foundry Company, Inc., due process and equal protection of the law.

2) Appellant, Inland Foundry Company, Inc., is not in violation of SCAPCA Regulation I, Article, IV, Section 4.02, because said regulation is in excess of the power granted to the Board of the Spokane County Air Pollution Control Authority, is unconstitutionally vague, and denies Appellant, Inland Foundry Company, Inc., due process and equal protection of the law.

3) Order 94-04 of the Director of the Spokane County Air Pollution Control Authority denies Appellant, Inland Foundry Company, Inc., due process of law.

4) Order 94-04 of the Director of the Spokane County Air Pollution Control Authority denies Appellant, Inland Foundry Company, Inc., equal protection of the laws.

II

Inland asserts these constitutional challenges to SCAPCA's Order 94-05, requiring it to comply with BACT:

1) Any conditions of the Spokane County Air Pollution Control Authority, imposed in 1984, that may require no emissions by Appellant, Inland Foundry Company, Inc., were unreasonable, arbitrary, beyond the authority of the Spokane County Air Pollution Control Authority, deny Appellant, Inland Foundry Company, Inc., equal protection of the law, and are accordingly void, invalid, unlawful, unconstitutional, and of no force and effect.

2) Order 94-05 is arbitrary, capricious, and an abuse of discretionary authority granted to the Director of the Spokane County Air Pollution Control Authority, and denies Appellant, Inland Foundry Company, Inc., due process of law.

3) Order 94-05 of the Director of the Spokane County Air Pollution Control Authority denies Appellant, Inland Foundry Company, Inc., equal protection of the laws.

4) Order 94-05 of the Director of the Spokane County Air Pollution Control Authority is an unlawful and unconstitutional attempt at an ex post facto or retroactive application of statutes, rules and regulations.

III

Washington courts have uniformly ruled that agencies are without authority to determine the constitutional validity of statutes. Yakima Clean Air v. Glascam Builders, 85 Wn.2d 255, 257, 534 P.2d 33 (1975); Bare v. Gorton 84 Wn.2d 380, 383, 526 P.2d 379 (1974); Prisk v. Poulsbo, 46 Wn. App. 793, 798-99, 732 P.2d 1013 (1987).

IV

Inland is not raising a facial constitutional challenge to regulations, statutes, or orders.

V

Some courts recognize a distinction between constitutional challenges to the facial validity of a statute, and the application of that statute to the facts before the administrative tribunal. This position would require exhaustion of remedies in the latter situation, but not the former. See Prisek, at 46 Wn. App. 798 (dictum, citing B. Schwartz, Administrative Law § 8.37 (2d ed. 1984)). This distinction was expressed as follows by noted administrative law commentator, Kenneth Culp Davis:

> A fundamental distinction must be recognized between constitutional applicability of legislation to particular facts and constitutionality of the legislation. When a tribunal passes upon constitutional applicability, it is carrying out the legislative intent, either express or implied or presumed. When a tribunal passes upon constitutionality of the legislation, the question is whether it shall take action which runs counter to the legislative intent. We commit to administrative agencies the power to determine constitutional applicability, but we do not commit to administrative agencies the power to determine constitutionality of legislation. Only the courts have the authority to take action which runs counter to the expressed will of the legislative body.
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> K. Davis, Administrative Law Text §20.04 (3d ed. 1972).

VI

This Board has declined in the past to rule on contentions that a statute, regulation, or procedures violate constitutional provisions. South Grays Harbor Timber Resources v. Department of Ecology, PCHB NOS. 92-53 & 92-151 (1992) (holding that the Board lacked authority to determine whether a regulation shifting the burden of proof to an appellant, violated

procedural due process: or whether a regulation was void for vagueness); Dennis Falk v. Southwest Air Pollution Control Authority, PCHB NO. 86-64 (1987) (holding that the Board has no authority to determine the constitutionality of an air authority's methods in gathering evidence and assessing a civil penalty); and A&M By-Products v. Northwest Air Pollution Authority, PCHB NOS. 84-270, 290-91, 321, 322, 85-46-48 (1985) (holding that the Board lacked authority to determine whether a regulation was constitutionally void for vagueness; or that it had the power to rule on appellant's constitutional claims of violation of due process and equal protection).

VII

There is a parallel however, between the authority of the Board to review regulations, as applied, for consistency with the underlying law; and review of regulations for their constitutionality, as applied. The Board consistently must interpret the underlying laws to resolve the disputes that come before it. The Board is bound by the statutes. When there is a conflict between the statutes and a regulation, the Board is bound to conform its decisions to the former. For this reason, the Board has consistently held that it has the authority to determine the consistency of regulations, as applied to the facts before it, with the underlying law. South Grays Harbor Timber Resources, at 25. This approach was upheld in D/O Center v. Department of Ecology 119 Wn.2d 761, 774-77, 837 P.2d 1007 (1992).

VIII

We recognize that as to alleged errors of law, the courts have the authority to substitute their judgment for that of the Board, provided that the court accords substantial weight to the agency's view of the law. Jensen v. Department of Ecology, 102 Wn.2d 109, 113, 685 P.2d 1068 (1984). This deference is due to the expertise of the Board in applying the law to a particular set of facts. The Administrative Procedure Act expressly acknowledges that the scope of review of the courts (in their judicial review of the Board's decision) includes: wheterh the order, statute, or regulation, upon which the Board's order is based: is in violation of constitutional provisions on its face, or as applied. We thus believe that the courts are interested in allowing the Board to provide its analysis of the law as applied to the facts, before the court comes to any conclusion. This belief was recently bolstered by a footnote in a recent Supreme Court decision, affirming a decision the Shorelines Hearings Board, as sister board of the Pollution Control Hearings Board.[1] Buechel v. Department of Ecology, 125 Wn.2d 196, 201 n.4, __P.2d __ (1994). In that case the Court refused to review an issue of "takings" under the constitution, because it had never been raised in the case before the Shorelines Hearings Board, the Superior Court, or the Court of Appeals. Id.

[1] Both boards share three permanent members, appointed by the Governor. RCW 43.21B.020, 90.58.170. These are two of the environmental boards which comprise the Environmental Hearings Office. RCW 43.21B.005.

IX

Therefore, we overrule our previous decisions, insofar as they suggest that the Board may not address the constitutionality of regulations, statutes, or orders, as applied to the facts before the Board. We continue, however, to adhere to the principle that the Board has no jurisdiction to opine on the questions of the facial constitutionality.

X

Based on the foregoing, the Board issues this:

ORDER

1. SCAPCA's motion to dismiss Inland's constitutional challenges is denied.

DONE this 2nd day of December, 1994.

POLLUTION CONTROL HEARINGS BOARD

Robert V. Jensen, Chairman

James A. Tupper, Jr., Member

P94-150D